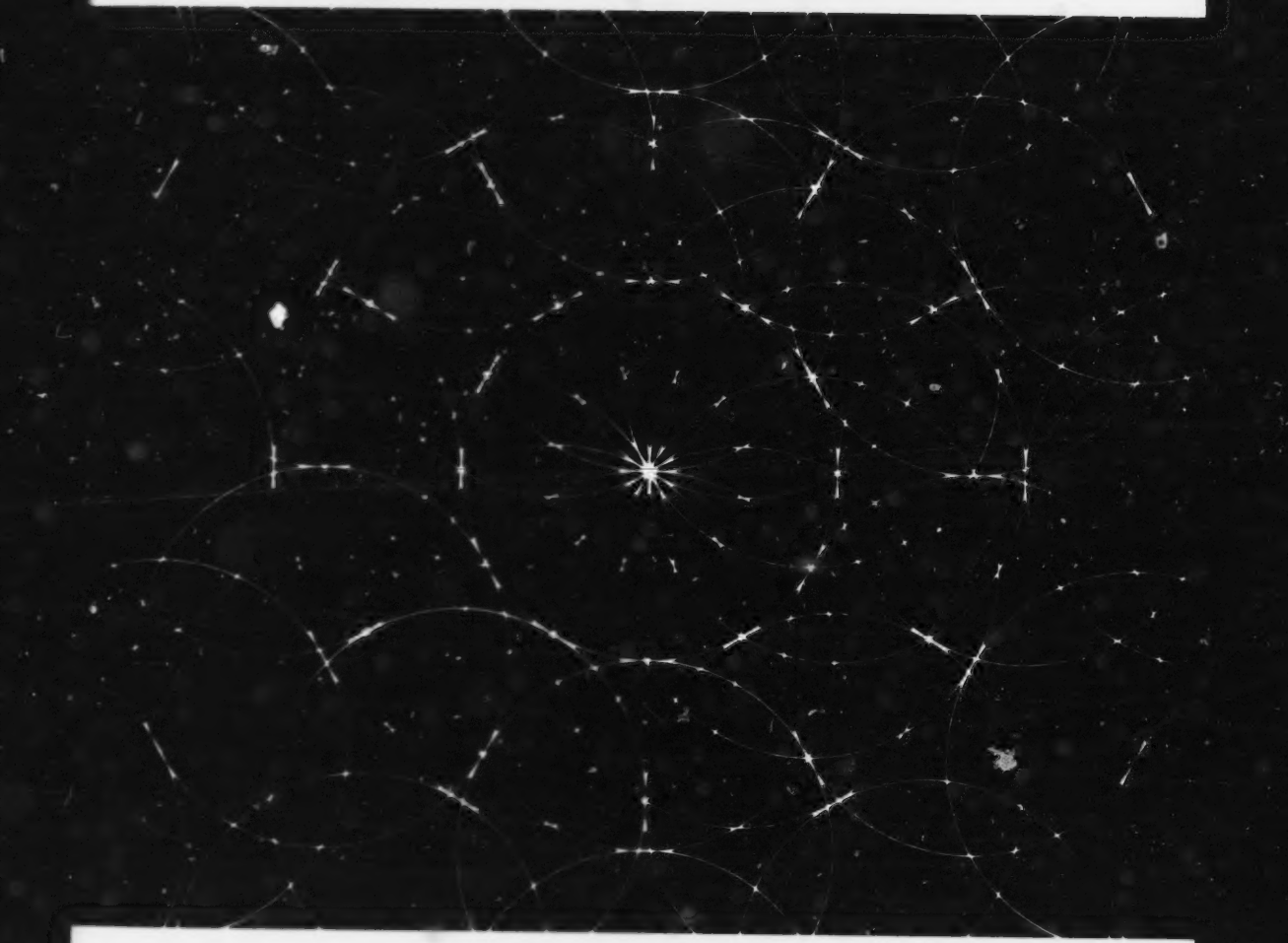
Report on

1983

The Uniform Sale of Goods Act



MANITOBA
LAW REFORM COMMISSION

LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT

on

THE UNIFORM SALE OF GOODS ACT

November 1, 1983

Report #57

The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

The Commissioners are:

Clifford H.C. Edwards, Q.C., *Chairman*
Knox B. Foster, O.C.
D. Trevor Anderson
George H. Lockwood, C.C.J.
Richard Thompson
*Geraldine MacNamara

Chief Legal Research Officer:

Ms. Donna J. Miller

Legal Research Officers:

Ms. Colleen Kovacs
Ms. Valerie C. Perry
Ms. Janice Tokar

Secretary:

Miss Suzanne Pelletier

The Commission offices are located at 521 Woodsworth Building, 405 Broadway, Winnipeg, Manitoba R3C 3L6. Tel. (204) 944-2896.

*resigned October 31, 1983

TABLE OF CONTENTS

	Page No
REPORT AND RECOMMENDATIONS	1
APPENDIX A: UNIFORM SALE OF GOODS ACT	5
APPENDIX B: List of Amendments to the Uniform Sale of Goods Act approved by the Manitoba Law Reform Commission and originally recommended by the Alberta Institute of Law Research and Reform, a Subcommittee of the Business Law Subsection of the Manitoba Branch of the Canadian Bar Association and by the Manitoba Law Reform Commission	65

In August, 1979, the Uniform Law Conference of Canada struck a special sub-committee, with representatives drawn from all provinces, to consider the adoption of a new Uniform Sale of Goods Act. The sub-committee was to study the draft Act prepared by the Ontario Law Reform Commission which was contained in that Commission's Report on Sale of Goods issued in 1979. The representative of this Commission on the special sub-committee was Professor E. Arthur Braid of the Faculty of Law, University of Manitoba. The members of that special sub-committee included some of the most knowledgeable experts in the field of commercial law in Canada.[1]

The special sub-committee met for a total of 36 days over a two-year period and presented a report and draft Act to the Uniform Law Conference of Canada in August, 1981. The draft Act was referred to the Legislative Drafting Section of the Conference for review and it was resolved that the product of the Legislative Drafting Section would be adopted by the Conference as a Uniform Act and recommended for enactment in that form.[2] The final English version of the Uniform Act was published in the Conference's 1982 proceedings.[3]

---

[1]The other members of the special sub-committee were Dr. Derek Mendes da Costa, Q.C. (Chairman) (Ontario); Prof. Michael G. Bridge (Alberta); Prof. R.C.C. Cuming (Saskatchewan); Mr. Karl J. Dore (New Brunswick); M. Michel Paquette (Quebec); Miss Diane Campbell (Prince Edward Island); Prof. David Vaver (British Columbia).

[2]See Uniform Law Conference of Canada, Proceedings of the Sixty-third Annual Meeting (August, 1981) at 34.

[3]Uniform Law Conference of Canada, Proceedings of the Sixty-fourth Annual Meeting (August, 1982) at 531 ff. A final French version of the Uniform Sale of Goods Act has not yet been adopted by the Conference. However, an unpublished French version of the Act, based upon the draft of the Conference's special subcommittee, is available. See Uniform Law Conference of Canada, Loi sur la vente de marchandises.

The Uniform Act was subsequently studied by the Alberta Institute of Law Research and Reform ("Institute") and by a sub-committee of the Business Law Subsection of the Manitoba Branch of the Canadian Bar Association ("Manitoba subcommittee"). The Institute published an extensive commentary on the Uniform Act in October, 1982.[4] The Report of the Manitoba subcommittee was released a year later.[5] Some very modest amendments to the Uniform Act were suggested by the Institute. These amendments were endorsed by the Manitoba subcommittee which, in turn, proposed some additional amendments. It should be noted that neither study had the benefit of the final version of the Uniform Act prepared by the Legislative Drafting Section of the Conference; instead, their point of reference was the earlier draft prepared by the Conference's special sub-committee.

This Commission has considered the reports of the Ontario Law Reform Commission, the Conference's special sub-committee, the Alberta Institute of Law Research and Reform, and the Manitoba subcommittee, as well as the Uniform Act itself. We have held meetings with our representative on the Conference's special committee, Professor Braid, to discuss the Uniform Act and the foregoing reports with a view to making final recommendations. We should like to record here our gratitude to him for all his advice and assistance. We have adopted minor changes to the Uniform Act which are largely drawn from the recommendations of both the Institute and the Manitoba subcommittee.

We note that "The Personal Property Security Act", C.C.S.M. c. P35, will require consequential amendment should the Uniform Act be adopted in Manitoba. In particular, subsection 63(4) of the Uniform Act contemplates that a notice may be filed in the Personal Property Registry to protect the rights of an owner as against another who buys or leases and receives goods

---

[4]Institute of Law Research and Reform, Report No. 38: The Uniform Sale of Goods Act (October, 1982).

[5]Report on the Draft Uniform Sale of Goods Act (April, 1983), released October, 1983 (unpublished).

for value and without notice from a person in possession. "The Personal Property Security Act" requires amendment to allow the registration of this notice.[6] Section 58 of "The Consumer Protection Act", C.C.S.M. c. C200, (which pertains to statutory warranties on retail sales), will also require review in light of the warranty provisions contained in s. 42 of the Uniform Act.[7]

The Commission now recommends as follows:

RECOMMENDATION 1

That, subject to the following recommendations 2 and 3, Manitoba enact the Uniform Sale of Goods Act, as set forth in Appendix A.

RECOMMENDATION 2

That, before the Uniform Act is enacted, changes be made in it as recommended by the Commission, the Alberta Institute of Law Research and Reform and by a Subcommittee of the Business Law Subsection of the Manitoba Branch of the Canadian Bar Association, which changes are summarized in Appendix B.

---

[6]This amendment would encompass only a procedural revision of "The Personal Property Security Act". It is not intended to change the substantive law that an ordinary sale of goods contract does not constitute a security interest capable of registration under the Act: J.J. Riverside Mfg. Ltd. v. E.J.W. Dev. Co. Ltd. [1981] 5 W.W.R. 607, 1 P.P.A.C. 330, 9 Man. R. (2d) 174 (Co. Ct.).

[7]It might also be appropriate to review "The Factors Act", C.C.S.M. c. F10, which pertains to the validity of sales by a mercantile agent, in light of Part VI of the Uniform Act regarding transfers of title and good faith buyers.

RECOMMENDATION 3

That the amended Uniform Act be passed and given Royal assent to come into force on a day to be fixed by proclamation.

RECOMMENDATION 4

That before the Uniform Act is proclaimed, the Government of Manitoba be satisfied that at least one other province has already proclaimed the Uniform Act in force or will, on or about the same time, proclaim the Uniform Act in force.

This is a Report pursuant to subsection 5(3) of "The Law Reform Commission Act", signed this 1st day of November, 1983.

Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

D. Trevor Anderson, Commissioner

George H. Lockwood, Commissioner

Richard Thompson, Commissioner

APPENDIX A

42A-1

UNIFORM SALE OF GOODS ACT

PART I

INTERPRETATION

1 In this Act,

Definitions

(a) "action" includes a counterclaim;

(b) "agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances, including those circumstances described in section 26;

(c) "bill of lading" means a document that:

(i) evidences the receipt of goods for shipment by any mode of carriage; and

(ii) is issued by a person engaged in the business of transporting or forwarding goods;

(d) "buyer" means a person who buys or contracts to buy goods;

(e) "buyer in the ordinary course of business" means a person who, in good faith and without knowledge that a sale to him is in violation of the ownership rights or security interest of a third party in the goods, buys in the ordinary course from a person in the business of selling goods of that kind for cash or by exchange of other property or on secured or unsecured credit, and includes a person who receives goods or documents of title under a pre-existing contract of sale, but does not include a person who receives a transfer in bulk within the meaning of [*insert reference to bulk sales legislation*] or as security for, or in total or partial satisfaction of, a money debt;

(f) "C.F" or "C. & F." means that the price for the goods includes cost and freight to the named destination;

(g) "C.I.F." means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination;

(h) "commercial unit" means a unit of goods that by commercial usage is a single whole for the purpose of sale, the division of which would materially impair its character or value on the market or its use, and includes a single article, a set of articles or a quantity treated in use or in its market as a single whole;

(i) "conforming", with respect to a contract of sale, means that goods or conduct, including any part of performance, are in accordance with the obligations under the contract;

(j) "contract" means the legal obligations that result from the parties' agreement as affected by this Act and any other applicable rules of law;

(k) "contract of sale" means a contract whereby the seller transfers or agrees to transfer the title in goods to the buyer for a price, and includes

(i) a contract for the supply of goods to be made, created or produced by the seller, whether or not to the buyer's order, and without regard to the relative value of the labour and materials involved,

(ii) a contract in which the seller retains a security interest in the goods, and

(iii) a contract to which section 43(2) applies;

(l) "course of dealing" means previous conduct between the parties to a transaction that may fairly be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct;

(m) "cure" means

(i) tender or delivery of any missing part or quantity of the goods;

(ii) tender or delivery of other conforming goods or documents or, in the case of a sale of identified goods, goods that differ in no material respect from those goods,

(iii) the remedying of any other non-conformity in performance,

(iv) a money allowance or other form of adjustment of the terms of the contract, or

(v) any appropriate combination of subclauses (i) to (iv);

(n) "delivery" means the voluntary transfer of possession;

(o) "document of title" means a writing that

(i) purports to be issued by or addressed to a bailee,

(ii) purports to cover goods in a bailee's possession that are identified or that are fungible portions of an identified mass, and

(iii) in the ordinary course of business, is treated as establishing that the person in possession of the document of title is, with any necessary endorsement, entitled to receive, hold and dispose of it and the goods it covers;

(p) "express warranty" means

(i) a term of the contract,

* (ii) a statement, in any form or language made by a seller before or at the time of the contract, including a promise or a representation of fact or opinion, whether or not made fraudulently, negligently or with contractual intention, that relates to the subject matter of the contract, except where the buyer did not rely, or it was unreasonable for him to rely, on the statement,

(iii) a statement described in section 42(5), (6), or (7), or

(iv) an express warranty described in section 42(9);

(q) "F.A.S." means free alongside;

(r) "fault" means a wrongful act, omission or breach;

(s) "financing agency" means a bank, finance company or other person who, in the ordinary course of business, makes advances against goods or documents of title or who, by arrangement with either the seller or the buyer, intervenes in the ordinary course to make or collect a

*denotes amendment to Uniform Act as set forth in Appendix B and approved by the Commission.

payment due or claimed under the contract of sale, whether or not documents of title accompany the bill;

(t) "F.O.B." means free on board;

(u) "fungible goods" means goods of which any one unit is the equivalent of any other unit by nature or by usage of trade or is so treated by agreement or in a document;

(v) "good faith" means honesty in fact and observance of reasonable standards of fair dealing;

* (w) "goods means tangible personal property and includes the unborn young of animals and anything attached to or forming part of real property as provided in section 9 or 10, but does not include things in action or the money in which the price is to be paid;

(x) "insolvent" means a person who has ceased to pay his debts in the ordinary course of business, who cannot pay his debts as they become due or who is insolvent within the meaning of the *Bankruptcy Act* (Canada);

(y) "instalment contract" means a contract that requires or authorizes the delivery of goods in separate lots to be separately accepted, notwithstanding a provision in the contract to the effect that each delivery is a separate contract;

(z) "lease" includes hire;

(aa) "merchant" means a person

(i) who deals in goods of the kind involved in a transaction,

(ii) who, by his occupation, holds himself out as having skill or knowledge appropriate to the practices or goods involved in a transaction, or

(iii) to whom the skill or knowledge described in subclause (ii) may be attributed by his employment of an agent or broker or other intermediary who, by his occupation, holds himself out as having that skill or knowledge;

(bb) "notify" means to take any steps that are reasonably required to give information to the person to be notified so that the information

(i) comes to his attention, or

(ii) is directed to him at the place of business or residence through which the contract or offer was made or at any other place that is held out by him as the place for receipt of such information;

(cc) "prescribed" means prescribed in the regulations;

(dd) "receipt", with respect to goods, means taking physical possession of them;

(ee) "security interest" means an interest in personal property, including goods, that secures payment or performance of an obligation;

(ff) "seller" means a person who sells or contracts to sell goods;

(gg) "signed" includes the execution or adoption of any symbol by a party to a contract of sale with the present intention of authenticating a writing;

(hh) "sale on approval" means a contract in which the goods are delivered primarily for use and in which the buyer has the right to return delivered goods even though they conform to the contract;

(ii) "sale or return" means a contract in which the goods are delivered for resale and in which the buyer has the right to return delivered goods even though they conform to the contract;

(jj) "usage of trade" means any reasonable practice or method of dealing that is observed in a place, vocation or trade with sufficient regularity to justify an expectation that it will be observed with respect to a specific transaction;

(kk) "value" means a consideration sufficient to support a contract;

(ll) "writing" includes any mechanical, electronic or other form of recording of information.

Interpretation re contracts of sale

2 In this Act, in relation to a contract of sale,

(a) termination of a contract of sale occurs when a party, pursuant to a power created by agreement or law, puts an end to the contract otherwise than for its breach, and thereupon all executory obligations are discharged, but any right based on prior breach or performance survives;

(b) cancellation of a contract of sale occurs when a party puts an end to the contract for breach by the other, and its effect is the same as that of termination, except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed part of the contract;

(c) where any action is required to be taken within a reasonable time, any time that is not manifestly unreasonable may be fixed by agreement;

(d) what is a reasonable time for taking any action depends on the nature or purpose of the action and all the other surrounding circumstances;

(e) an action is taken seasonably when it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

PART II

SCOPE AND APPLICATION OF ACT

(Application of Act) Application of Act

3(1) This Act applies to every contract of sale and other transaction governed by this Act that is entered into on or after the day on which this Act comes into force.

What constitutes a contract of sale

(2) Whether or not a contract in the form of a lease of goods, bailment, hire-purchase, consignment or otherwise is a contract of sale depends on the intention of the parties, the substantial effect of the contract and all the other surrounding circumstances.

Act applies to "near sales"

(3) If relevant in principle and appropriate in the circumstances, any of the provisions of this Act may be applied by analogy to a transaction respecting goods other than a

contract of sale, such as a lease of goods or a contract for the supply of labour and materials.

[NOTE: Subsection (3) is an optional provision.]

Non application of Act

4 This Act does not apply to any transaction that is intended to operate only as a secured transaction, whether or not it is in the form of an unconditional contract of sale.

Crown bound

5 The Crown is bound by this Act.

Passing of interest in goods

6 Any interest in goods that are the subject of a contract of sale may only pass if the goods are both existing and identified.

(Future goods) Meaning of 'future goods'

7(1) Goods that are not both existing and identified are future goods.

Purported sale of future goods

(2) A purported present sale of future goods or of any interest in future goods operates as a contract to sell.

Fungible goods

8 An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined, and any proportion of such a bulk or any quantity of the bulk agreed upon by number, weight or other measure may, to the extent of the seller's interest in the bulk, be sold to the buyer who then becomes an owner in common.

Sale of minerals, etc.

9 A contract of sale of minerals, hydrocarbons or other substances to be extracted from real property is a contract of sale of goods if they are to be severed by the seller, but, until severed, a purported present sale of any such substances that is not effective as a transfer of an interest in real property operates as a contract to sell.

(Sale of fixtures, etc.) Sale of fixtures, etc.

10(1) A contract of sale of growing crops, timber, fixtures or other things attached to real property that are intended to be severed from the real property under the contract is a contract of sale of goods

(a) whether the subject matter is to be severed by the buyer or by the seller, and

(b) even though the subject matter forms part of the real property at the time of contracting and severance is to take place at a later time;

and the parties can by identification effect a present sale before severance.

Rights of third parties

*(2) The rights of a buyer under subsection (1) are subject to

(a) the interest of any person, other than the seller, who had a registered interest in the real property at the time of the contract of sale and

(b) the interest of

(i) a subsequent purchaser or mortagagee for value of an interest in the real property,

(ii) a creditor with a lien on the real property subsequently obtained as a result of judicial process, or

(iii) a creditor with a prior registered encumbrance on the real property in respect of subsequent advances;

if the subsequent purchase or mortgage was made, the lien was obtained or the subsequent advance under the prior encumbrance was made or contracted for without actual notice of the contract of sale.

Registration

(3) For the purposes of subsection (2), a notice in the prescribed form registered in the appropriate land registry office (*or* land titles office) constitutes actual notice of the buyer's rights under the contract of sale.

(Price) Price, how payable

11(1) The price under a contract of sale may be made payable in money or otherwise.

Price includes goods

(2) Where the price is payable in whole or in part in goods, each party is a seller of the goods that he is to transfer and a buyer of the goods that he is to receive.

Price includes real property

(3) Where the price is payable in whole or in part by the transfer of an interest in real property, this Act applies to the transfer of the goods and to the seller's obligations in connection with the transfer of goods, but this Act does not apply to the transfer of the interest in real property or to the buyer's obligations in connection with the transfer of the interest in real property.

PART III

GENERAL

Waiver, variation of provisions of Act

12 Except as otherwise provided in this Act, any provision of this Act may be varied or waived by agreement of the parties.

Standards of performance of obligations

* **13** The obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be waived by the parties, but the parties may agree on the standards by which the performance of those obligations are to be measured if the standards agreed on are not manifestly unreasonable.

Obligation of good faith

* **14** Every duty that is created by a contract of sale or by this Act requires good faith in its performance, whether or not it is expressly so stated.

Rights, etc. enforceable by action

15 Unless otherwise provided by this Act, where any right is conferred or any duty or liability is imposed by this Act, it may be enforced by an action.

General principles of law applicable

16 The principles of law and equity, including the law merchant, the law relating to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake and other validating or invalidating rules of law supplement this Act and continue to apply.

Parol evidence rule not applicable

17 No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing prevents or limits the admissibility of evidence to prove the true terms of the agreement, including evidence of any collateral agreement or representation or evidence as to the true identity of the parties.

Limitation on effect of Act

18 Nothing in this Act affects

(a) the rights of a holder in due course of a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada),

(b) the rights of a holder of a document of title under an Act of the Parliament of Canada; or

(c) an Act of the Province other than this Act.

PART IV

FORMATION, ADJUSTMENT AND ASSIGNMENT OF CONTRACTS

(Capacity to buy and sell) Definition

19(1) In this section, "necessaries" means goods suitable to the condition in life of the minor or other person and to his actual requirements at the time of delivery of the goods.

Capacity to buy and sell

(2) Where necessaries are sold and delivered to a minor or to a person who is incompetent to contract, he shall pay a reasonable price for the necessaries.

(Making of contract of sale) Making of contract of sale

20(1) A contract of sale may be made in any manner sufficient to show agreement.

Moment of making may be undetermined

(2) A contract of sale may be found even though the specific time of its making is undetermined.

Effect of additional or different terms

(3) A reply to an offer purporting to be an acceptance but containing additional or different terms that do not materially alter the terms of the offer constitutes an acceptance and, in that case, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Notice of objection ★

(4) Subsection (3) does not apply if the offeror seasonably notifies the offeree of his objection to the additional or different terms.

Material alteration of terms of offer

(5) For the purpose of subsection (3), additional or different terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are terms that materially alter the terms of the offer.

(Conflicting terms) Conflicting terms

21(1) Subject to section 20(3), this section applies where, under the law of contract, the parties are considered to have concluded a contract of sale because one of them has proceeded with performance, even though their communications do not show mutual assent to a single set of contractual terms.

Powers of court

(2) When a court concludes that, having regard to all of

the circumstances, a party, by his conduct in receiving or shipping the goods or otherwise, has not in fact assented to the conflicting terms of the other party and that it would be unreasonable to hold him to those terms, the court may

(a) ignore the conflicting terms and apply this Act as if the contract contained no such terms,

(b) substitute any terms that, in the court's opinion, the parties would have adopted had their attention been drawn to the conflicting terms, or that, in the court's opinion, represent a reasonable compromise of the conflicting terms, or

(c) find that no contract was concluded between the parties and make any consequential order that the court considers appropriate.

Relevant factors

(3) In exercising its discretion under subsection (2) and in determining whether or not it would be unreasonable to hold a party to the other party's terms, the court shall have regard, among other things, to

(a) the usage of trade in the vocation or trade in which the parties are engaged,

(b) the parties' course of dealings and course of performance, and

(c) the extent to which a party seeks not to be bound by a term without which, as he knew or ought to have known, the other party would not have been willing to enter into the contract.

(Firm offers)
Firm offers

* **22**(1) An offer by a merchant to buy or sell goods that expressly provides that it will be held open is not revocable for lack of consideration during the time stated or, if no time is stated, for a reasonable time not exceeding three months.

Form supplied by offeree

(2) An assurance of irrevocability described in subsection (1) in a form supplied by the offeree is not binding unless the assurance is separately signed by the offeror.

Revoked offers

23 Where an offer to buy or sell goods that the offeror should reasonably expect to induce substantial action or

forbearance by the offeree before acceptance induces such action or forebearance and is revoked, the offeror is bound to compensate the offeree, and in any such case, the court may

*

(a) award damages on the same basis as if a contract had been completed between the parties, or

(b) grant compensation limited to the restoration of any benefit conferred upon the offeror, to the recovery of any losses incurred as a result of reliance on the offer or generally, to the extent necessary to avoid injustice.

(Forms of acceptance) Forms of acceptance

24(1) Unless otherwise indicated by the language or the circumstances

(a) an offer to make a contract of sale is to be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances, including performance of a requested act; and

(b) an order or other offer to buy goods for prompt or current shipment is to be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

Acceptance by tender or beginning of performance

(2) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance or requires acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance and binds the offeree to render complete performance.

Duty to notify of acceptance by performance

(3) If an offeree who accepts by performance knew or should reasonably have known that the offeror has no adequate means of learning of the acceptance with reasonable promptness and certainty, the contractual duty of the offeror is discharged, unless

(a) the offeree notifies the offeror seasonably of his acceptance,

(b) the offeror learns of the performance within a reasonable time, or

(c) the circumstances of the offer indicate that notification of acceptance is not required.

(Sales by auction) Sales by auction: lots

25(1) Where goods are sold by auction in lots, each lot is the subject of a separate contract of sale.

When auction sale complete

(2) A sale by auction is complete when the auctioneer announces completion of the sale in any customary manner.

Reserve bids

(3) A sale by auction is with reserve, unless the goods are put up for sale without reserve.

Auctions with reserve

(4) In a sale by auction with reserve, the auctioneer may withdraw the goods at any time until he announces completion of the sale.

Auctions without reserve

(5) In a sale by auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn, unless no bid is made within a reasonable time.

Bidder's right to retract bid

(6) In a sale by auction with or without reserve, the bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

Seller's right to bid

(7) A right to bid at a sale by auction may be reserved expressly by or on behalf of the seller.

Wrongful bid by seller

(8) Where a seller has not reserved the right to bid at a sale by auction, the seller or his agent shall not bid and the auctioneer shall not knowingly take any bid from the seller or his agent.

Consequences

(9) Where subsection (8) is contravened, the buyer may treat the sale as fraudulent and may avoid the sale and recover damages or may affirm the sale and recover damages or claim an abatement in the price.

(Course of dealing and usage of trade) Course of dealing and usage of trade

26(1) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify the terms of an agreement.

Place of performance

(2) An applicable usage of trade in the place where any part of performance is to occur may be used in interpreting the agreement with respect to that part of the performance.

Course of performance

(3) Where an agreement involves repeated occasions for performance by a party with knowledge of the nature of the performance and opportunity for objection to it by the other party, any course of performance accepted or acquiesced in without objection is relevant in determining the meaning of the agreement.

Relationship to express terms

(4) The express terms of the agreement, any course of performance and any course of dealing and usage of trade are, whenever reasonable, to be construed as consistent with each other but, when such a construction is unreasonable,

(a) the express terms of the agreement govern the course of performance, the course of dealing and usage of trade,

(b) the course of performance governs the course of dealing and the usage of trade, and

(c) the course of dealing governs the usage of trade.

Course of performance as waiver or variation

(5) Subject to section 27, course of performance is relevant to show a waiver or variation of any term inconsistent with the course of performance.

Variation or rescission of contract of sale

* **27** An agreement varying or rescinding a contract of sale needs no consideration to be binding, but a party may withdraw from an executory portion of the agreement made without consideration and revert to the original contract by giving reasonable notice to the other party, unless the withdrawal would be unjust in view of a material change of position in reliance on the agreement.

Delegation of performance

28 A party to a contract of sale may perform his duty under it through a delegate, unless the other party has a substantial interest in having the original promisor perform or control the acts required by the contract, but a delegation of performance does not relieve the party delegating of any duty to perform or of any liability for breach.

(Assignments) Assignment of rights

29(1) The rights of a seller or buyer may be assigned except where the assignment would

(a) change materially the duty of the other party,

(b) increase materially the burden or risk imposed on the other party by the contract, or

(c) impair materially the other party's opportunity to obtain return performance.

Assignment of right to damages etc

(2) A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation may be assigned notwithstanding contrary agreement, but then only in its entirety, whether or not the assignment occurs before or after performance of the assignor's obligation.

Construction of term prohibiting assignment

(3) Unless the circumstances indicate the contrary, a term prohibiting assignment of a contract is to be construed as barring only the delegation to the assignee of the assignor's duty of performance.

Assignments in general terms

(4) An assignment of "the contract" or of " all my rights under the contract" or an assignment in similar general terms is

(a) an assignment of rights under the contract, and

(b) unless the language or the circumstances indicate the contrary, a delegation of performance of the duties of the assignor, other than the duty to pay damages for a breach arising before the assignment.

Acceptance of assignment by assignee

(5) The acceptance by the assignee of an assignment under subsection (4) constitutes a promise by him to perform the duties of the assignor that is enforceable by either the assignor or the other party to the original contract.

Grounds for insecurity

(6) A party to a contract other than an assignor may treat an assignment that delegates performance as creating reasonable grounds for insecurity for the purposes of section 87.

PART V

GENERAL OBLIGATIONS AND CONSTRUCTION OF CONTRACT

(General obligations of parties) General obligations of parties

30(1) The seller shall deliver the goods and the buyer shall accept and pay for them in accordance with the terms of the contract of sale.

Meaning of buyer's obligation to pay extended

(2) The buyer's obligation to pay includes taking any steps and complying with any formalities that are required under

the contract and any relevant law to enable payment to be made or to ensure that it will be made.

(Unconscionable contracts) Unconscionable contracts or parts of contracts

31(1) If the court finds the whole or any part of a contract of sale to have been unconscionable at the time it was made, the court may

(a) refuse to enforce the whole contract or rescind it on any terms that may be just,

(b) enforce part of the contract without the unconscionable part, or

(c) limit the application of any unconscionable part or revise or alter the contract so as to avoid any unconscionable result.

Factors to be considered in determining unconscionability

(2) In determining whether the whole or any part of a contract of sale is unconscionable, the court may consider, among other factors

(a) the commercial setting, purpose and effect of the contract and the manner in which it is made,

(b) the relative bargaining strength of the seller and the buyer, taking into account the availability of reasonable alternative sources of supply or demand,

(c) the degree to which the natural effect of the transaction, or any party's conduct prior to or at the time of the transaction, is to cause or aid in causing another party to misunderstand the true nature of the transaction and of his rights and duties under the transaction,

(d) whether the party seeking relief knew or should reasonably have known of the existence and extent of the terms alleged to be unconscionable,

(e) the degree to which the contract requires a party to waive rights to which he would otherwise be entitled,

(f) in the case of a provision that purports to exclude or limit a liability that would otherwise attach to the party seeking to rely on it, which party is better able to safeguard himself against loss or damages,

(g) the degree to which a party has taken advantage of the inability of the other party to reasonably protect his interests because of his physical or mental infirmity,

illiteracy, inability to understand the language of the agreement, lack of education, lack of business knowledge or experience, financial distress or other similar factors,

(h) gross disparity between the price of the goods and the price at which similar goods could be readily sold or purchased by parties in similar circumstances, and

(i) knowledge by a party, when entering into the contract, that the other party will be substantially deprived of the benefits reasonably anticipated by that other party under the transaction.

* (3) The court may raise the issue of unconscionability of its own motion. Power of court

(4) This section applies notwithstanding any agreement or waiver to the contrary. No waiver

(5) For the purposes of this section, a contract of sale includes any agreement to vary or rescind the contract under section 27 and any assurance of irrevocability under section 22. Application of section

* **32**(1) An agreement may constitute a contract of sale even though the price is not settled and, in that case, the price is a reasonable price at the time for delivery if (Open price) Open price

(a) nothing is said as to price,

(b) the price is left to be agreed by the parties or another person and they fail to agree or the other person fails to fix the price, or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by another person or agency and it is not so set or recorded.

* (2) Where the price is to be fixed by a party, he shall do so in good faith. Where party to fix price

* (3) Where the price left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of a party, the other party may treat the contract as cancelled or may himself fix a reasonable price. Where there is failure to fix a price

(4) Where the parties intend not to be bound unless the Where no price fixed

price is fixed or agreed and it is not fixed or agreed, there is no contract, and, in that case, the buyer shall return any goods already received or, if he is unable to do so, shall pay their reasonable value at the time of delivery, and the seller shall return any part of the price paid on account.

Output and requirements agreements

33 Where an agreement measures the quantity of goods to be bought or sold by the output of the seller or the requirements of the buyer, the quantity required is any reasonable quantity that may be required or supplied by the buyer or seller acting in good faith, having regard to any stated estimates, any previous output or requirements and all the circumstances of the case.

Exclusive dealing agreements

34 Unless the circumstances show a contrary intention, where the buyer lawfully agrees to buy goods exclusively from the seller or the seller lawfully agrees to sell goods exclusively to the buyer, there is an obligation by the seller to use reasonable efforts to supply the goods and by the buyer to use reasonable efforts to promote their sale.

Delivery in single lot or in lots

35 All goods called for by a contract of sale are required to be tendered in a single delivery and payment is due only on such tender but, where the circumstances give either party the right to make or demand delivery in lots and where the price can be apportioned, payment may be demanded for each lot.

Place for delivery of goods

36 The place for delivery of goods under a contract of sale is governed by the following:

(a) if the seller has only one place of business, it is the place for delivery;

(b) if the seller has two or more places of business only one of which is known to the buyer, that place of business is the place for delivery;

(c) if the seller has two or more places of business and the buyer knows two or more of them, the place of business at or from which the seller conducted the negotiations for the sale is the place for delivery;

(d) if the seller has no place of business, his residence is the place for delivery;

(e) if the seller has no place of business and two or

more residences only one of which is known to the buyer, that place of business is the place for delivery;

(f) if the seller has no place of business and two or more residences and the buyer knows two or more of them, the place of business at or from which the seller conducted the negotiations for the sale is the place for delivery;

(g) where, in a contract of sale of identified or unascertained goods, the parties knew at the time of contracting that the goods were or were to be drawn from bulk or made, created or produced at a particular place, that place is the place for delivery.

Delivery of documents of title

37 Documents of title may be delivered through customary banking channels.

Action to be taken within reasonable time

38 Except where otherwise provided in this Act, any action that is required to be taken by either party under a contract of sale is required to be taken within a reasonable time.

(Termination of certain contracts) Successive performances

39(1) A contract of sale that provides for successive performances over an indefinite period of time may be terminated by either party at any time.

Where notice of termination required

(2) Except where a contract of sale described in subsection (1) terminates upon the happening of an agreed event, it may be terminated only if the terminating party gives the other party reasonable notification of the termination.

(Payment) When and where payment due

40(1) Payment is due at the time and place which the buyer is to receive the goods even though the place of shipment is the place of delivery

(2) Where the seller is authorized to send the goods, he may ship them under reservation and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due.

Payment against documents

(3) Where delivery is authorized and made by way of documents of title otherwise than under subsection (2), payment is due at the time and place at which the buyer receives the documents regardless of where the goods are received.

Goods shipped on credit

(4) Where the seller is required or authorized to ship the

goods on credit, the credit period commences at the time of shipment, the date of the invoice or the date of the dispatch of the invoice, whichever is latest.

(Open particulars of performance) Open particulars of performance

41(1) An agreement that is sufficiently definite to be a contract of sale is not invalid by the fact only that it leaves particulars of performance to be specified by one of the parties, but any such specification is required to be within the limits set by commercial reasonableness.

Specifications re assortment and shipment

(2) Specifications relating to assortment of the goods are at the buyer's option and, except as otherwise provided in this Act, specifications relating to shipment are at the seller's option.

Effect of failure to co-operate

(3) Where a specification mentioned in subsection (2) would materially affect the other party's performance but is not seasonably made, or where a party's co-operation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party, in addition to all other remedies

(a) is excused from any resulting delay in his own performance, and

(b) subject to sections 88, 89 and 99, may proceed to perform in any reasonable manner.

(Express warranties) Qualified statements

42(1) A conditional or qualified statement may be treated as unconditional or unqualified if it would be unconscionable for the maker of the statement to rely on the condition or qualification.

Liability of seller for statements of others

(2) A seller is deemed to make any statements of a manufacturer, distributor or other person relating to the goods that by word or conduct he has adopted.

Liability of merchant sellers for statements of others

(3) Where the seller is a merchant, he is deemed to make any statement relating to the subject matter of the contract and made by the manufacturer, distributor or other person on the container or label of goods or a brochure, pamphlet or other writing associated with the goods, except where, in all the circumstances, it is apparent that the seller did not adopt the statement.

Seller's right to indemnity

(4) A seller liable under subsection (2) or (3) is entitled to be indemnified by the maker of the statement in respect of his liability.

Buyer's statements

★ (5) A statement relating to the subject matter of the contract and made by a buyer to a seller is an express warranty, except where the seller did not rely, or it was unreasonable for him to rely, on the statement.

Liability of manufacturers, etc.

★ (6) A statement relating to the subject matter of the contract and made to a buyer by a manufacturer, distributor or other person with a direct business interest in any sale of the goods is an express warranty, except where the buyer did not rely, or it was unreasonable for him to to rely, on the statement.

Statements made to public

(7) A statement made by a seller or a person mentioned in subsection (6) to the public that has a tendency to induce reliance is an express warranty, whether or not the buyer actually relied on the statement.

Irrelevant factors

(8) The liability of the maker of a statement mentioned in subsection (6) is not affected by the fact that

(a) there is no privity of contract between him and the buyer, or

(b) the buyer gave no consideration in respect of the statement.

Sale by sample

(9) In a contract of sale by sample or model there is an express warranty that the goods to be supplied will conform to the sample or model in all respects.

Implied warranties re title; Implied warranty of title

43(1) In a contract of sale, other than a contract to which subsection (2) applies, there is an implied warranty by the seller

(a) that, in the case of a present sale, he has a right to sell the goods and that, in the case of a contract to sell, he will have a right to sell the goods at the time when the title is to pass,

(b) that the goods will be delivered free from any security interest, lien or encumbrance or rightful claim in respect of any industrial or intellectual property right not disclosed or actually known to the buyer before the contract was made, and

(c) that the buyer will be entitled to quiet possession of the goods, except insofar as it may be disturbed by a person entitled to the benefit of any security interest,

lien, encumbrance or industrial of intellectual property right that is disclosed or known.

Qualified title

(2) Where there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller will transfer only such title as he or another person may have, there is an implied warranty by the seller

(a) that all defects in title and all security interests, liens and encumbrances or industrial or intellectual property rights known to the seller and not known to the buyer were disclosed to the buyer before the contract was made, and

(b) that

(i) the seller,

(ii) in a case where the parties to the contract intend that the seller will transfer only such title as another person may have, the other person, or

(iii) any person claiming through or under the seller or the other person otherwise than under a security interest, lien or encumbrance or industrial or intellectual property right disclosed or known to the buyer before the contract was made;

will not disturb the buyer's quiet possession of the goods.

Effective time of implied warranty

(3) Where the seller retains a security interest in the goods, his implied warranty of title takes effect when the goods are delivered to the buyer.

(Implied warranty of merchantable quality) Definition

44(1) In this section, "merchantable quality" means

(a) that the goods, whether new or used, are

(i) as fit for the one or more purposes for which goods of that kind are commonly bought or used,

(ii) of such quality, and in such condition, as is reasonable to expect having regard to any description applied to them, the price and all other relevant circumstances;

(b) without limiting the generality of clause (a), that the goods

(i) are goods that pass without objection in the trade under the contract description,

(ii) in the case of fungible goods, are of fair or average quality within the description,

(iii) within the variations permitted by the agreement, are of the same kind, quality and quantity within each unit and among all units involved,

(iv) are adequately contained, packaged and labelled as the nature of the goods or the agreement require, and

(v) will remain fit, perform satisfactorily and continue to be of such quality and in such condition for any length of time that is reasonable having regard to all the circumstances, and

* (c) in the case of a new goods, unless the circumstances indicate otherwise, that spare parts and repair facilities, if relevant, will be available for a reasonable period of time.

Implied warranty of merchantable quality

(2) Where the seller is a person who deals in goods of the kind supplied under a contract, there is an implied warranty that the goods are of merchantable quality.

Exceptions

(3) The implied warranty of merchantable quality does not apply

* (a) to defects specifically drawn to the buyer's attention before the contract was made,

(b) if the buyer examines the goods before the contract was made, to any defect that the examination should have revealed,

or

(b) in the case of a sale by a sample or model, to any defect that would have been apparent on reasonable examination of the sample or model.

(Implied warranty of fitness) Implied warranty of fitness

45(1) Where the buyer, expressly or impliedly, makes known to the seller any particular purpose for which he is buying the goods and the seller deals in goods of that kind, there is an implied warranty that the goods supplied under the contract are reasonably fit for that purpose, whether

or not it is a purpose for which goods of that kind are commonly supplied, and that the goods will so remain for any length of time that is reasonable having regard to all the circumstances.

Exception

(2) The implied warranty mentioned in subsection (1) does not apply where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller to supply goods reasonably fit for the buyer's particular purpose.

Warranties re contracts of work and materials

46 Sections 42 to 45 apply, with all the necessary modifications, to goods supplied under a contract of work and materials.

Warranties re leases of goods

47 Sections 42, 43(1)(a) and (c), 44 and 45 apply, with all the necessary modifications, to a contract for the lease of goods.

(Exclusion and modification of warranties) Exclusion and modification of warranties

48(1) Subject to subsection (2) and section 17,

(a) a warranty implied under this Act,

(b) the effect of a statement that would otherwise amount to an express warranty, and

(c) the remedies for breach of a warranty,

may be modified, limited or excluded by the parties.

Unconscionable modification, etc.

(2) A modification, limitation or exclusion of a warranty or of a remedy for breach of a warranty is prima facie unconscionable to the extent that it impairs a right or remedy in respect of injury to the person.

Construction of warranties

(3) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty are, where reasonable, to be construed as consistent with one another, but, to the extent that such a construction is unreasonable, the negation or limitation has no effect.

Application of section

(4) This section applies to an express warranty mentioned in sections (1)(p)(iii) and (iv)

(a) where the modification, limitation or exclusion comes to the buyer's attention before he acts in reliance upon the statement, or

(b) where the statement is made to the public or a segment of the public and

(i) the buyer may reasonably be expected to learn of the modification, limitation or exclusion before relying upon the statement, or

* (ii) the statement and the modification, limitation or exclusion are contained in the same document or may otherwise reasonably be expected to come to the buyer's attention at the same time.

(Cumulative construction of warranties)
Cumulation and conflict of warranties

49(1) Implied or express warranties are to be construed as consistent with one another and as cumulative, but, if that construction is unreasonable, the intention of the parties determines which warranty is dominant.

(2) For the purpose of subsection (1), the following presumptions apply:

(a) exact or technical specifications supersede an inconsistent sample or model or general language of description;

(b) a sample from an existing bulk supersedes inconsistent general language of description;

(c) express warranties supersede inconsistent implied warranties, other than any implied warranties of fitness for a particular purpose.

(Rights of subsequent buyers)
Definitions

50(1) In this section

(a) "goods" includes goods that have been converted into, incorporated in or attached to other goods or that have been incoporated in or attached to real property;

(b) "immediate buyer" means a buyer who buys goods from a prior seller;

(c) "injury" means injury to the person, damage to property or any economic loss;

(d) "prior seller"means a merchant who sells goods that are subsequently resold;

* (e) "subsequent buyer" means a buyer who buys goods that have previously been sold by a prior seller to an immediate buyer.

Prior seller's warranty

(2) Without prejudice to a subsequent buyer's rights under section 42, a prior seller's warranty, express or implied, and any remedies for breach of any such warranty, enure in favour of any subsequent buyer of the goods who suffers injury because of a breach of the warranty.

Subsequent buyer's rights

(3) A subsequent buyer's rights under subsection (2) are subject to any defence that would have been available to the prior seller in an action against him for breach of the same warranty by the immediate buyer.

Subsequent buyer's damages

(4) The amount of damages recoverable by a subsequent buyer for breach of warranty by a prior seller is not to exceed the amount of damages that the immediate buyer could have recovered from the prior seller if the immediate buyer had suffered the injury sustained by the subsequent buyer.

(Obligations of parties re F.O.B. and F.A.S. delivery terms) Obligations of parties re F.O.B. term

51(1) Where a contract contains the term F.O.B. at a named place, even though used only in connection with the stated price,

(a) if the term is F.O.B. the place of shipment, the seller shall, at that place, ship the goods in the manner provided in section 69 and bear the expense and risk of putting them into the possession of the carrier and the buyer shall seasonably give any necessary instructions for making delivery,

(b) if the term is F.O.B. the place of destination, the seller shall, at his own expense and risk, transport the goods to that place and there tender delivery of them in the manner provided in section 68,

(c) if the term is also F.O.B. vessel, car or other mode of carriage, the seller shall, in addition to his obligations under clause (a), at his own expense and risk, load the goods on board and the buyer shall seasonably give any necessary instructions for making delivery,

(d) if the term F.O.B. vessel, in addition to the obligations under clause (c), the buyer shall name the vessel and, in an appropriate case, the seller shall comply with section 54 on the form of bill of lading.

F.A.S. vessel

(2) Where a contract contains the term F.A.S. vessel at a named port, even though used only in connection with the stated price, the seller shall

(a) at his own expense and risk, deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer, and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading,

and the buyer shall seasonably give any necessary instructions for making delivery.

Effect of failure to give instructions

(3) The seller may

(a) treat the failure to give any necessary instructions as a failure to co-operate under section 41, and

(b) at his option, move the goods in any reasonable manner preparatory to delivery or shipment.

Payment against tender of documents

(4) Where a contract contains the term F.O.B. vessel or F.A.S. vessel, the buyer shall make payment against tender of the required documents and the seller shall not tender and the buyer shall not demand delivery of the goods in substitution for the documents.

Seller's obligations under C.I.F. term

52(1) Where a contract contains the term C.I.F. destination or its equivalent, even though used only in connection with the stated price and destination, the seller shall, at his own expense and risk,

(a) put the goods into the possession of a carrier at the port for shipment and obtain one or more negotiable bills of lading covering the entire transportation to the named destination,

(b) load the goods and obtain receipt from the carrier, which may be contained in the bill of lading, showing that the freight has been paid or provided for,

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern, but the seller may add to the price the amount of the premium for the war risk insurance,

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract, and

(e) forward and tender with commercial promptness all the documents in due form and width any endorsement necessary to perfect the buyer's rights.

and the buyer shall make payment against tender of the required documents and the seller shall not tender and the buyer shall not demand delivery of the goods in substitution for the documents.

C. & F. term

(2) Where a contract contains the term C. & F., C.F. or its equivalent, subsection (1), except clause (c), applies to the seller and the buyer.

Seller's duty under "net landed weights" and similar terms

(3) Where a contract contains the term C.I.F., C.F. or C. & F. and the price is based on or it is to be adjusted according to "net landed weights", "delivered weights", "out turn quantity" or "out turn quality" or a similar term, the seller shall reasonably estimate the price.

Settlement of price

(4) The price estimated under subsection (3) is the payment due on tender of the documents required by the contract and, after final adjustment of the price, a settlement is to be made with commercial promptness.

Risk of ordinary deterioration, etc.

(5) A contract under subsection (3) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and similar risks in transportation, but the placing of that risk on the seller has no effect on the place or time of identification to the contract of sale or delivery or on the passage of the risk of loss.

Inspection before payment

(6) Where a contract under subsection (3) provides for payment on or after arrival of the goods, the seller shall, before payment, allow any preliminary inspection that is feasible, but, if the goods are lost, delivery of the documents and payment are due when the goods should have arrived.

(Delivery ex-ship) Delivery ex-ship

53(1) Where a contract contains a term for delivery of goods "ex-ship" or its equivalent, the term is not restricted to a particular ship and requires delivery from a ship that has reached a place at the named port of destination where goods of the kind are usually unloaded, and

(a) the seller shall discharge all liens arising out of the carriage and furnish the buyer with a direction that puts the carrier under a duty to deliver the goods, and

(b) the risk of loss does not pass to the buyer until the goods are properly unloaded.

(Overseas shipments) Definition

54(1) In this section, "overseas", with respect to a shipment, means a shipment by water or by air or a contract contemplating such a shipment insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep-water commerce.

Overseas shipment: form of bill of lading

(2) Where a contract contemplates overseas shipment and contains the term C.I.F., C.F., C. & F. or F.O.B. vessel, the seller shall obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of the term C.I.F. or C. & F., received for shipment.

Tender of bill of lading in parts

(3) Where, in a case described in subsection (2), a bill of lading has been issued in a set of parts, the buyer may demand tender of the full set of documents unless they are to be sent from abroad, in which case only part of the bill of lading is required to be tendered and, even if there is a stipulation requiring a full set of documents, the person tendering an incomplete set may require payment upon furnishing an adequate indemnity.

("No arrival, no sale" terms) "No arrival, no sale" terms

55 Where a contract contains the term "no arrival, no sale" or its equivalent,

(a) the seller shall properly ship conforming goods and, if they arrive by any means, he shall tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival, and

(b) where, without the fault of the seller, the goods suffer partial loss or arrive after the contract time, the buyer may proceed under section 92 as if there had been casualty to identified goods.

("Letter of Credit" etc.) Definitions

56(1) In a contract of sale,

(a) "Letter of credit" or "banker's credit" means an irrevocable credit issued by a financing agency of good repute and, where the shipment is abroad, of good international repute;

(b) "confirmed credit" means that a letter of credit or banker's credit also carries the direct obligation of an agency of the kind described in clause (a) that does business in the seller's financial market.

Letter of credit

(2) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract.

Delivery suspends payment obligation

(3) The delivery to the seller of a letter of credit suspends the buyer's obligation to pay, but if it is dishonoured, the seller may, on seasonable notification to the buyer, require payment directly to him.

Sale on approval

57 In a sale on approval,

(a) even though the goods are identified to the contract, the risk of loss and the title do not pass to the buyer until acceptance,

(b) use of the goods on a trial basis is not acceptance, but failure seasonably to notify the seller of the buyer's election to return the goods or any other act adopting the transaction is acceptance, and, if the goods conform to the contract, acceptance of any part is acceptance of the whole, and

(c) after due notification of the buyer's election to return, the return is at the seller's risk and expense, but a merchant buyer shall follow any reasonable instructions.

Sale or return

58 In a sale or return,

(a) the option to return extends to the whole or any commercial unit of the goods if their condition remains substantially unchanged, but the option is required to be exercised seasonably, and

(b) goods are at the buyer's risk until they are returned to the seller and the buyer is responsible for their return.

PART VI

TRANSFER OF TITLE AND GOOD FAITH BUYERS

Interpretation

59 In this part, other than in sections 60 and 62, "goods" includes a document of title.

(General rules re transfer of title) General irrelevance of title

60(1) Except as otherwise provided in this Act, the provisions of this Act relating to the rights, obligations and remedies of the seller, buyer and any third party apply without regard to the person who has title to the goods.

General rules for the transfer of title

(2) Where questions concerning title become material, title passes from the seller to the buyer at the time and in the manner agreed upon by the parties, except that

(a) title cannot pass before goods have been identified to the contract as provided in section 67, and

(b) any reservation by the seller of the title in goods shipped or delivered to the buyer is limited to the reservation of a security interest.

Where no time specified for title to pass

(3) Where there is no agreement between the parties with respect to the time at which the title to the goods is to pass to the buyer, the following rules apply:

(a) title passes at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, notwithstanding the reservation of a security interest and that a document of title is to be delivered at a different time or place;

(b) where delivery is to be made without moving the goods, title passes

(i) where the seller is required to deliver a document of title, at the time when, and the place where, he delivers the document,

(ii) where the goods are held by a bailee other than the seller and the seller is not required to deliver a document of title, when the bailee acknowledges to the buyer his right to possession of the goods, and

(iii) in any other case, when the buyer receives the goods.

Where title is revested in seller

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, revests title to the goods in the seller.

(*Nemo dat* rule) *Nemo dat* rule

61(1) Except as otherwise provided in this Part, where goods are sold by a person who does not own them and

who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than that of the seller.

Exceptions

(2) Subsection (1) does not apply where the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Idem

(3) Subsection (1) does not affect

(a) [*jurisdictions should insert a reference to The Factors Act*] or any other enactment enabling the apparent owner of goods to dispose of them as if he were the true owner of them, or

(b) the validity of any contract or sale under any common law or statutory power of sale or under the order of a court of competent jurisdiction.

Owner's failure to exercise reasonable care

(4) Without limiting the generality of subsection (2), an owner is precluded from denying the authority to sell of the person in possession of the goods, where

(a) he has failed to exercise reasonable care with respect to the entrusting of the goods, and

(b) the buyer has exercised reasonable care in buying the goods and has received the goods in good faith, for value and without notice of the defect in the title of the transferor or his lack of authority to sell the goods.

Failure of owner and buyer to exercise reasonable care

(5) If, in an action between the owner and the buyer pursuant to subsection (4), the court finds that both have failed to exercise reasonable care, the court may allocate the loss between them and make any other order with respect to the goods that it considers fair in the circumstances.

Registration re entrusted goods

(6) Subsection (4) does not apply to an entrusting of goods under a transaction governed by [*jurisdictions should insert a reference to The Personal Property Security Act*] or any other Act requiring the registration or filing in a public place of a document relating to the transaction.

(Voidable title) Effect of voidable title

62(1) A person with a voidable title has power to transfer a good title to a buyer who receives the goods in good faith,

for value and without notice of the defect in the title of the transferor, even though the owner has purported to avoid the sale to the transferor.

Extended meaning of voidable title

(2) A person with a voidable title has the power to transfer described in subsection (1), even though

(a) the transferor was deceived as to the identity of the buyer,

(b) the goods were delivered in exchange for a cheque that is later dishonoured,

(c) it was agreed that the transaction was to be a cash sale,

(d) the transfer of title was procured by fraud, or

(e) the transaction was entered into under a mistake of a character that renders the agreement void at common law.

(Transfer of goods in possession) Definitions

63(1) In this section,

(a) "prospective buyer" means a person who receives the goods

(i) under a sale on approval or under a contract of sale or return,

(ii) under an agreement containing an option to purchase, or

(iii) under a contract of sale that is subject to approval by another person or the fulfillment of any other condition;

(b) "prospective seller" means a person from whom a prospective buyer receives the goods.

Effect of possession of goods by seller, etc.

(2) Where a seller, buyer or prospective buyer is in possession of goods, he has the capacity to transfer all rights of the person consenting to his possession to a person who buys or leases and receives the goods from him in good faith, for value and without notice of the defect in the title of the transferor.

Application of subsection (2)

(3) Subsection (2) applies

(a) where a seller, having sold goods, continues in

possession of the goods with the buyer's consent, whether in his capacity as seller or otherwise, or

(b) where a buyer or prospective buyer is in possession of the goods with the seller's or prospective seller's consent before title in the goods has been transferred to him.

Non-application of subsection (2)

(4) Subsection (2) does not apply

(a) where, prior to the disposition of the goods by the person in possession, a security interest to which [*insert reference to The Personal Property Security Act or other provincial legislation*] applies has been perfected by registration in favour of the buyer or seller, or

(b) where, in any other case, a notice in the prescribed form has been filed under [*insert reference to The Personal Property Security Act or other provincial legislation*] prior to the disposition of the goods by the person in possession.

(Transfer of entrusted goods) Definitions

64(1) In this section, "entrust" includes any delivery and any acquiescence in retention of possession regardless of

(a) any condition expressed between the parties to the delivery or acquiescence; and

(b) whether the procurement of the entrusting or the possessor's disposition of the goods has been fraudulent.

Entrustment of goods to merchant

(2) Where the possession of goods is entrusted to a merchant who deals in goods of that kind for any purpose connected with sale or promoting sales of goods of that kind gives him power to transfer all rights of the entruster to a buyer or lessee in the ordinary course of business.

Effect of avoidance of sale and revocation of consent

65 Unless goods are recovered by their owner before they have been delivered by the person in possession of them to a third party, sections 63 and 64 apply even though the owner has revoked his consent to possession of the goods by the seller, buyer, prospective buyer or merchant, as the case may be.

Right of owner to recover goods

66(1) In this section, "buyer" includes a person claiming from or under a buyer.

(2) Where sections 61(3), 62, 63 and 64 apply, a court may,

where it considers it fair, make an order that the owner may recover the goods from the buyer if the owner repays the buyer the price or its equivlaent value in money that was paid by the buyer for the goods, together with any other reliance losses that the buyer would otherwise suffer.

PART VII

PERFORMANCE

(Insurable interests in goods)
Buyer's special property and insurable interest

67(1) The buyer obtains a special property and an insurable interest in goods by the identification of existing goods as goods to which the contract refers, even though the goods so identified are non-conforming and he has a right to return or reject them.

Manner of identification

(2) An identification described in subsection (1) may be made at any time and in any manner expressly agreed upon by the parties.

Presumptive rules

(3) In the absence of express agreement, identification occurs

(a) in the case of a contract for the sale of goods already existing and agreed upon by the parties as the goods to be delivered under the contract, when the contract is made,

(b) in the case of a contract for the sale of future goods other than those described in clause (c) or (d), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers,

(c) in the case of a contract for the sale of crops to be harvested within 12 months or the next normal harvest season after contracting, whichever is longer, when the crops are planted or otherwise become growing crops,

(d) in the case of a contract for the sale of unborn young to be born within 12 months after contracting, when the young are conceived.

Seller's insurable interest

(4) The seller retains an insurable interest in goods so long as he has title to or any security interest in the goods or the risk of loss of the goods.

Seller's right to substitute goods

(5) Where identification is by the seller alone, he may substitute other goods for those identified until

(a) the buyer's default or insolvency, or

(b) he has notified the buyer that the identification is final.

Other insurable interests not affected

(6) Nothing in this section impairs any insurable interest recognized under any other law of the province.

(Tender of delivery) Seller's tender of delivery

68(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery.

Manner of tender

(2) The manner, time and place for tender are determined by the agreement and this Act, and in particular

(a) tender is required to be at a reasonable hour and, if it is of goods, they are to be kept available for the period reasonably necessary to enable the buyer to take possession, and

(b) the buyer is required to furnish facilities reasonably suited to the receipt of the goods.

Goods in possession of bailee

(3) Where goods are in the possession of a bailee and are to be delivered without being moved, tender requires

(a) that the seller tender to the buyer a negotiable document of title covering the goods or an acknowledgement by the bailee to the buyer of the buyer's right to possession of the goods, or

(b) that the seller tender to the buyer a non-negotiable document of title or a written direction to the bailee to deliver, unless the buyer seasonably objects.

Fixing of buyer's rights

(4) The receipt by the bailee of a notification of the buyer's rights fixes those rights as against the bailee and all other persons, but risk of loss of the goods and of any failure by the bailee to honour the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honour the document or to obey the direction defeats the tender.

Tender of documents

(5) Where the contract requires the seller to deliver documents, he shall tender all documents in correct form, except as provided in section 54 with respect to bills of

lading in a set, and he may tender those documents through customary banking channels.

Dishonoured bill of exchange

(6) If a bill of exchange accompanying documents is dishonoured, it constitutes non-acceptance or rejection of the contract.

Shipment by seller

69 Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, tender requires that the seller

(a) put the goods in the possession of any carrier and make any contract for their transportation that may be reasonable having regard to the nature of the goods and other circumstances of the case,

(b) obtain and promptly deliver or tender in correct form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade, and

(c) promptly notify the buyer of the shipment.

(Seller's reservation of security interest)

Seller's shipment under reservation

70(1) Where the seller has identified goods to the contract by or before shipment

(a) the seller's procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods,

(b) the seller's procurement of a negotiable bill of lading to the order of a financing agency or of the buyer indicates, in addition, the seller's expectation of transferring that interest to the person named, and

(c) the seller's procurement of a non-negotiable bill of lading to himself or his nominee reserves in him a security interest in the goods but, except in the case of a conditional delivery governed by section 72, a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

Wrongful reservation of security interest

(2) Where shipment by the seller with reservation of a security interest violates the contract of sale, it constitutes an unreasonable contract for transportation contrary to section 69, but does not impair the rights given to the buyer

by shipment and identification of the goods to the contract or to the seller as holder of a negotiable document of title.

(Rights of financing agency)
Rights of financing agency

71(1) By paying or purchasing for value a bill of exchange that relates to a shipment of goods, a financing agency acquires, to the extent of the payment or purchase and in addition to its own rights under the bill of exchange and any document of title securing it, any rights of the seller in the goods.

Defective document regular on its face

(2) The right to reimbursement of a financing agency that has in good faith honoured or purchased a bill of exchange under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document that was apparently regular on its face.

(Buyer's duty to accept and pay)
Tender of delivery by seller

72(1) Tender of delivery is a condition of the buyer's duty to accept and pay for the goods.

Buyer's rights conditional

(2) Where the goods or documents of title are delivered to the buyer and payment is due and demanded, the buyer's rights as against the seller to retain or dispose of them is conditional upon his making the payment due.

(Right to cure)
Seller's right to cure

73(1) Where a buyer rejects a non-conforming tender or delivery, whether before or after the time for performance has expired, the seller has a reasonable time to cure the non-conformity, if

(a) the non-conformity can be cured without unreasonable prejudice, risk or inconvenience to the buyer,

(b) after being notified of the buyer's rejection, the seller seasonably notifies the buyer of his intention to cure and of the type of cure to be provided, and

(c) the type of cure offered by the seller is reasonable in the circumstances.

Where no right to cure

(2) Notwithstanding subsection (1), the buyer may cancel the contract where the seller fails seasonably to tender, deliver or otherwise perform any other term of the contract, if

(a) in the circumstances, it is unreasonable to expect the buyer to give the seller more time to perform, or

(b) the seller fails to perform within a further reasonable period of time set by the buyer.

Right to damages preserved

(3) Nothing in this section affects the buyer's right to recover damages arising out of a breach by the seller.

Transfer of risk of loss: Risk of loss, absence of breach

74(1) Subject to sections 57, 58 and 75, the following rules govern the transfer of risk of loss of the goods:

(a) where the contract requires or authorizes the seller to ship the goods by carrier,

(i) unless it requires him to deliver them at a particular destination and they are there tendered while in the possession of the carrier, the risk passes to the buyer when they are tendered there so as to enable the buyer to take delivery, and

(ii) if the seller is a merchant, the risk passes to the buyer when the goods are tendered to the buyer at the destination;

(b) where the goods are held by a bailee other than the seller and are to be delivered without being moved, the risk passes to the buyer

(i) on his receipt of a negotiable document of title covering them,

(ii) on acknowledgment by the bailee to the buyer of the buyer's right to possession of them, or

(iii) after his receipt of a non-negotiable document of title or other written direction to deliver as provided in section 70(5);

(c) where clauses (a) and (b) do not apply, the risk passes to the buyer on his receipt of the goods.

Saving

(2) Nothing in this section affects the rights, duties or liabilities of either the seller or the buyer as a bailee of the goods of the other party.

Effect of breach on transfer of risk of loss: Effect of breach on risk of loss

75(1) Where a tender or delivery of goods fails to conform to the contract in a manner that gives a right of rejection of the goods, the risk of loss arising before acceptance or cure remains with the seller to the extent of any deficiency in the buyer's insurance coverage.

Where buyer in breach

(2) Subject to section 88(3), where the buyer of conforming goods already identified to the contract repudiates the contract or is responsible for any delay in delivery of the goods before risk of loss has passed to him, the risk of loss, to the extent of any deficiency in the seller's insurance coverage, rests on the buyer for a commercially reasonable time sufficient to enable him to insure the goods.

(Tender of payment) Tender of payment by buyer Manner of tender

76(1) Tender of payment is a condition of the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner acceptable in the ordinary course of business, unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

Payment by cheque

(3) Payment by cheque or other instrument is conditional and is defeated as between the parties if the cheque or other instrument is dishonoured.

(Payment before inspection) Payment before inspection

77(1) Where the contract requires payment before inspection, non-conformity of the goods does not excuse the buyer from making the payment unless

(a) the non-conformity appears without inspection, or

(b) the seller has acted fraudulently.

Buyer's rights unimpaired

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods and does not impair the buyer's right to inspect or any of his remedies.

(Inspection of goods) Buyer's right to inspect goods

78(1) Subject to subsection (4), where goods are tendered or delivered or identified to the contract, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner.

Inspection after arrival

(2) Where the seller is required or authorized to send the goods to the buyer, the inspection may be made after their arrival.

Expenses of inspection

(3) The buyer shall bear the expenses of inspection but may recover them from the seller if the goods do not conform and are rejected.

(4) Subject to section 52(5), (6) and (7), the buyer is not entitled to inspect the goods before payment of the price if the contract provides Inspection before payment

(a) for delivery C.O.D. or on similar terms, or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(5) A place or manner of inspection fixed by the parties is presumed to be exclusive but, unless otherwise expressly agreed, it does not affect the time of identification, the place of delivery or the transfer of the risk of loss. Place and method of inspection

(6) If inspection at the place or by the manner fixed by the parties becomes impossible, rights of inspection are those provided in this section, unless the place or manner fixed was clearly intended as an indispensable condition, failure of which would avoid the contract. Where agreed place or method of inspection impossible

79 Documents against which a bill of exchange is drawn are to be delivered to the drawee upon acceptance of the bill of exchange if it is payable more than three days after presentment, and in other cases, only upon payment. When documents deliverable

80(1) In order to facilitate the adjustment or resolution of a claim or dispute between a buyer and a seller, either party, for the purpose of ascertaining the facts and preserving evidence, has the right to inspect, test and sample the goods, but where the goods are in the possession or control of the other, that right may only be exercised on reasonable notification to the other party. (Preserving evidence of goods in dispute) Preserving evidence of goods in dispute

(2) Where a party is refused the right to inspect, test or sample the goods, he may apply to a court [*jurisdiction should insert name of appropriate court*] and a judge of the court may, upon any terms as to notice and otherwise that he considers proper, make any order that he considers just in all the circumstances of the case. Where access refused

(3) The rights conferred by subsections (1) and (2) are in addition to any rights conferred under the rules of court of the court in which proceedings relating to the contract of sale have been commenced. Rights under rules of court preserved

PART VIII

BREACH, REPUDIATION AND EXCUSE

(Improper delivery) Buyer's rights on improper delivery

81(1) Subject to section 90, if the goods or the tender of delivery are non-conforming, the buyer may

(a) reject the whole,

(b) accept the whole, or

(c) accept those commercial units that are conforming and reject the remainder.

Payment for accepted goods

(2) The buyer shall pay at the contract rate for any goods accepted by him.

(Acceptance of goods) Loss of right to reject on acceptance

82(1) They buyer loses the right to reject goods when he has accepted them.

Acceptance of goods

(2) The buyer accepts the goods where

(a) he signifies to the seller that the goods are conforming or that he will take or retain them despite their non-conformity,

(b) he knew or should reasonably have known of their non-conformity and he fails seasonably to notify the seller of his rejection of the goods,

(c) the goods are no longer in substantially the condition in which the buyer received them and this change is due neither to any defect in the goods themselves nor to casualty suffered by them while at the seller's risk; or

(d) the non-conformity is of a minor nature and a substantial period has elapsed after delivery.

Preservation of right of rejection

(3) The buyer does not accept goods by reason only that he has kept them in the reasonable belief, induced by the seller, that they are conforming or that their non-conformity will be cured.

Commercial unit

(4) A buyer who accepts part of a commercial unit is deemed to accept the whole of that unit.

Other remedies

(5) Acceptance does not of itself impair any other remedy provided by this Act.

Buyer's duties after rejection

83 Subject to sections 84 and 85,

(a) after rejection, use of the goods or other acts of ownership by the buyer do not nullify the rejection unless the seller has been materially prejudiced by them; and

(b) if, before rejection, the buyer has taken physical possession of goods on which he does not have a lien, he shall, after rejection, hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them, but the buyer has no other obligations with regard to goods rightfully rejected.

(Merchant buyer's duties re rejected goods)
Merchant buyer's duties re rejected goods

84(1) Subject to any lien of the buyer arising under section 109, when the seller has no agent or place of business at the place of rejection, a merchant buyer is under a duty after rejection of goods in his possession or control

(a) to follow any reasonable instructions received from the seller with respect to the goods; and

(b) in the absence of any instructions described in clause (a), to make reasonable efforts to sell them for the seller's account if they are perishable or are likely to decline rapidly in value.

Reasonable instructions and indemnification

(2) For the purpose of subsection (1), instructions are not reasonable if the buyer is not indemnified for expenses on demand.

Buyer's right to expenses

(3) Where the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for

(a) reasonable expenses of caring for and selling them; and

(b) if expenses do not include a selling commission, to the commission that is usual in the trade or, if there is none, to a reasonable sum not exceeding 10% of the gross proceeds.

Other rights not affected

(4) Where the parties do not agree as to the buyer's right to reject the goods, any instructions given to or actions taken by the buyer pursuant to subsection (1) do not affect any other rights of the parties.

Buyer to act in good faith

(5) In complying with this section, the buyer shall act in a commercially reasonable manner.

Effect of good faith conduct ★

(6) Any action by the buyer under this section taken in good faith is deemed not to be acceptance or conversion of the goods or to give rise to a claim in damages.

(Salvage of rejected goods)

Buyer's options as to salvage of rejected goods

85(1) Subject to section 84, with respect to perishable goods or goods that are likely to decline rapidly in value, if the seller gives no instructions within a reasonable time after notification of rejection the buyer may

(a) store the rejected goods for the seller's account;

(b) reship them to him; or

(c) resell them for the seller's account and claim reimbursement under sections 84(3) to (6).

Salvage not acceptance, etc. ★

(2) Any action by the buyer pursuant to subsection (1) taken in good faith is deemed not to be acceptance or conversion of the goods or to give rise to a claim in damages.

(Effect of unstated non-conformity)

Waiver of buyer's objections

86(1) If the buyer fails to state in connection with rejection a non-conformity that is ascertainable by reasonable inspection, he is precluded from relying on the unstated non-conformity to justify rejection where the seller could have cured the non-conformity if it had been stated seasonably.

Payment against documents

(2) If the buyer makes payments against documents without reserving his rights, he is precluded from recovering his payment where the non-conformity was apparent on the face of the documents.

Seller not prejudiced

(3) Subsections (1) and (2) do not apply where the seller has not been duly prejudiced by the buyer's failure to state a non-conformity or to reserve his rights.

(Adequate assurance of performance) Interpretation

87(1) In this section, "adequate assurance of due performance" means any assurance that is commercially reasonable in the circumstances and may include the provision, whether by a party to the contract or another person, of

(a) a report, opinion or explanation;

(b) an affirmation of due performance;

(c) security or surety for due performance; or

(d) an undertaking respecting extension of a warranty period or respecting cure by replacement, repair, money allowance or contract adjustment.

Right to adequate assurance of performance

(2) Where reasonable grounds for insecurity arise with respect to the performance of either party, the other party may in writing demand adequate assurance of due performance and, until he receives that assurance, may, if reasonable, suspend any performance for which he has not already received the agreed return.

Acceptance of improper tender

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of further performance.

Failure to provide adequate assurance

(4) After receipt of a demand under subsection (3), failure to provide, within a reasonable time not exceeding 30 days, adequate assurance of due performance constitutes a repudiation of the contract.

Where adequate assurance is provided

(5) Upon adequate assurance being provided, the aggrieved party's obligation to perform is restored, but he is not liable for any delay resulting from his suspension of performance.

(Consequences of repudiation) Anticipatory repudiation

* **88**(1) Where either party's refusal or inability to perform a future obligation constitutes a repudiation of the contract, the other party may

(a) resort to any remedy for breach, whether or not the aggrieved party has awaited performance after learning of the repudiation and even though he has notified the repudiating party that he would await the latter's performance or has urged him to perform notwithstanding his repudiation;

(b) suspend his own performance; or

(c) where the contract is repudiated by the buyer, proceed in accordance with section 101.

Where repudiating party suffers loss

(2) Where the repudiating party has suffered forseeable detriment or loss as a result of his reliance upon a notification or urging under section (1)(a), the aggrieved party

(a) shall not exercise his remedies under this section unless he first gives the repudiating party reasonable notice of his intention to do so; and

(b) is liable to compensate the repudiating party for any foreseeable detriment or loss that he has suffered before receipt of the notice mentioned in clause (a).

Duty to mitigate loss

(3) The repudiating party is not liable for loss or damage that the aggrieved party should have foreseen and could have mitigated or avoided without undue risk, expense or prejudice.

(Retraction of repudiation) Retraction of repudiation

89(1) The repudiating party may retract his repudiation at any time before his next performance is due, unless the aggrieved party has, since the repudiation,

(a) cancelled the contract;

(b) otherwise indicated that he considers the repudiation final; or

(c) materially changed his position.

Methods of retraction

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under section 87.

Consequences of retraction

(3) Retraction reinstates the repudiating party's rights under the contract but the aggrieved party is not liable, and is entitled to be compensated, for any delay occasioned by the repudiation.

(Instalment contracts) Remedies for breach of instalment

90(1) Subject to subsection (2), the buyer's rights and remedies with respect to a non-conforming instalment of an instalment contract and the seller's rights and remedies with respect to breach by the buyer of his obligations in relation to an instalment of an instalment contract are the same with respect to that instalment as if it were a separate contract.

Breach of the whole contract

(2) Subject to section 73, if a non-conformity or breach with respect to one or more instalments of an instalment contract substantially impairs the value of the whole contract, the aggrieved party may cancel the contract.

(Failure of pre-supposed conditions) Excuse by failure of pre-supposed conditions

91(1) Subject to sections 92 to 94, a seller who wholly or partly fails to perform or delays performance is excused from liability under the contract if the agreed performance has been made impracticable

(a) by the occurrence of a contingency that was not due to his fault and the non-occurrence of which was an underlying assumption of the contract; or

(b) by a compliance in good faith with any applicable foreign or domestic law, even if the law is later found to be invalid.

Notification of excuse

(2) A seller excused from performance under subsection (1) shall seasonably notify the buyer of his inability to perform and is liable for any damage suffered by the buyer arising from a failure to do so.

Buyer's performance

(3) This section applies with all the necessary modifications where the buyer's agreed performance nas been made impracticable.

(Non-existence of or casualty to identified goods) Non-existence of or casualty to identified goods

92(1) Where the seller's performance is or becomes impracticable under section 91(1) because of the parties' mistaken assumption that the goods are in existence or because the goods suffer loss through casualty, including theft, the following rules apply unless either party has expressly or impliedly assumed a greater obligation:

(a) if the loss or non-existence is total, the seller's obligation to deliver the goods is discharged but the buyer is discharged from the obligation to pay the price only if the risk has not passed to the buyer;

(b) if the loss or non-existence is partial and the risk has not passed to the buyer, the buyer may

(i) inspect the goods, and

(ii) either treat the contract as terminated or accept the goods with due allowance from the contract price but without any other rights against the seller;

(c) where the events referred to in clause (b) occur after the risk has passed to the buyer, the seller is discharged to the extent of the loss or non-existence from the obligation to deliver conforming goods but the buyer remains liable for the price.

Application of subsection (1)

(2) Subsection (1) applies to

(a) a contract that requires for its performance goods identified when the contract is made or goods that have been subsequently identified to the contract with the consent of both parties; or

(b) a contract that contains a "no arrival, no sale" term or its equivalent.

Substituted performance

(3) Except for a contract that contains a "no arrival, no sale" term or its equivalent, subsections (1)(a) and (b) do not apply where the seller is able to tender performance that differs in no material respect from that agreed on, in which case the seller is bound to make and the buyer to accept the tender, but each party's obligation is excused if it would cause him undue hardship.

(Prorated performance) Prorated performance

93(1) Where the causes mentioned in section 91(1) affect only a part of the seller's capacity to perform, he shall, in any manner that is fair and reasonable, allocate production and deliveries among his customers, or where there is only one customer, to that customer, but may at his option include customers not then under contract as well as his own requirements for future manufacture.

Notification to buyer

(2) A seller allocating under subsection (1) shall notify the buyer seasonably of the estimated quota made available to him.

Procedure on notice claiming excuse

(3) Where the buyer is notified pursuant to subsection (2) of an allocation of goods or under section 91(2) of a material or indefinite delay, he may, by written notification to the seller,

(a) terminate and thereby discharge any unexecuted portion of the contract, or

(b) modify the contract by agreeing to the delay or agreeing to take his available quota in substitution with due allowance from the contract price.

Termination of contract

(4) If, after receipt of a notification pursuant to subsection (2), the buyer fails to modify the contract pursuant to subsection (3)(b) within a reasonable time not exceeding 30 days, the contract is terminated with respect to any deliveries affected.

(5) Subsections (3) and (4) apply

Application of subsections (3) and (4)

(a) to a single delivery, and

(b) to all deliveries under an instalment contract where the prospective deficiency substantially impairs the value of the whole contract.

(6) This section applies with all the necessary modifications where the buyer's agreed performance has been made impracticable.

94(1) Where, without fault of either party,

(Substituted performance) Substituted performance, shipment, delivery or payment

(a) the agreed berthing, loading or unloading facilities fail,

(b) an agreed type of carrier is unavailable,

(c) the agreed manner of delivery otherwise becomes commercially impracticable, or

(d) the agreed means or manner of payment fails because of domestic or foreign law,

but a commercially reasonable substitute is available, that substitute performance is required to be tendered and accepted.

(2) Where delivery has been made, payment by the means or in the manner provided by a law mentioned in subsection (1)(d) discharges the buyer's obligation, unless the law is discriminatory, oppressive or confiscatory.

Substituted performance, payment after delivery

95(1) [*jurisdictions should include a reference to their Frustrated Contracts Act or other similar provision*] applies to

(Application of frustrated contracts legislation) Application of frustrated contracts legislation

(a) a contract of sale that has been terminated pursuant to sections 91 to 94; and

(b) a partial or delayed performance pursuant to section 91, 92 or 93.

(2) If there is a conflict between the provisions of this Act and the provisions of [*jurisdictions should include a reference to their Frustrated Contracts Act or other similar provision*], this Act prevails.

Act prevails

PART IX

REMEDIES

Remedies for breach of non-contractual warranties

96 Except as otherwise provided in this Part, the remedies for breach of a warranty that does not constitute a term of the contract are the same as the remedies for breach of a contract of sale.

Remedies for breach of collateral contracts

97 Nothing in this Act impairs any remedy of a buyer or seller for breach of any obligation or promise collateral or ancillary to the contract of sale.

Seller's remedies on buyer's insolvency

98 Where the buyer is insolvent, the seller may withhold delivery as provided in section 103 and stop delivery under section 104.

Seller's remedies

99 Where the buyer breaches the contract, the seller may, as provided in this Act

(a) maintain an action for damages,

(b) withhold delivery of any goods in his possession,

(c) stop delivery by any bailee,

(d) recover the price,

(e) obtain specific performance,

(f) cancel the contract,

(g) proceed under section 103 respecting goods unidentified to the contract,

(h) resell and recover damages.

(Seller's right to cancel) Seller's right to cancel

100(1) The seller may cancel a contract where

(a) the buyer fails to make payment or take delivery of the goods or perform any other obligation on the date or within the time provided in the contract and if, in the circumstances, it is unreasonable to expect the seller to give the buyer more time to perform or to remedy a defective performance,

(b) in any other case, the buyer fails to perform within a further reasonable period set by the seller,

(c) the buyer repudiates the contract under section 88(1), or

(d) the buyer wrongfully rejects the seller's tender or delivery;

but goods in the buyer's possession may not be recovered by the seller unless he is otherwise entitled to reclaim them.

(2) For the purpose of subsection (1),

Meaning of failure to pay and failure to take delivery

(a) a failure to pay includes a failure to make any arrangements for payment that are required under section 30(1), and

(b) a failure to take delivery includes a failure to perform any acts that are required of the buyer under the terms of the contract to enable the seller to make delivery.

101(1) Where the seller is entitled to cancel the contract, he may

(Rights of seller consequent on cancellation) Seller's right to identify goods

(a) identify to the contract conforming goods not already identified if, at the time he learned of the breach, the goods are in his possession or control, or

(b) treat as the subject of resale goods that have demonstrably been intended for the particular contract, even though those goods are unfinished.

(2) Where the seller is entitled to cancel the contract and the goods are unfinished at the time of the breach, he shall exercise reasonable commercial judgment for the purposes of effective realization and avoidance of loss, and may,

Unfinished goods

(a) complete the manufacturer and wholly identify the goods to the contract,

(b) cease manufacture and resell the goods for scrap or salvage value, or

(c) proceed in any other reasonable manner.

102 In sections 103, 104 and 105, "seller" includes

Person in position of seller

(a) an agent of the seller to whom the bill of lading has been endorsed,

(b) a consignor or agent who has himself paid or is directly responsible for the price,

(c) anyone who otherwise holds a security interest in the goods, or

(d) any person who is in the position of a seller.

(Seller's right to withhold delivery) Seller's right to withhold delivery

103(1) The seller may withhold delivery of goods in his possession

(a) until the buyer pays any amount due on or before delivery,

(b) until payment of the price where the buyer is insolvent;

(c) where the buyer repudiates the contract, until retraction of the repudiation as provided in section 89, or

(d) where the seller has requested adequate assurance of due performance under section 87(2), until adequate assurance of due performance has been provided.

Seller's expenses

(2) The seller's right to withhold delivery under subsection (1) extends to any reasonable expenses in relation to the care and custody, transportation and stoppage of the goods and other incidental expenses incurred by him subsequent to the buyer's breach or insolvency.

Where seller agent or bailee

(3) The seller may exercise his right to withhold delivery notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Part delivery

(4) Where a seller has made part delivery of the goods, whether under an indivisible contract or under an instalment contract, he may withhold delivery of the remainder until payment of all amounts that are due, unless the part delivery has been made under circumstances that show an agreement to waive the right to withhold delivery.

Judgment no bar

(5) A seller who may withhold delivery or stop delivery under section 104 does not lose his right to do so by reason only that he has obtained judgment for the price of the goods.

(Seller's right to stop delivery) Seller's stoppage of delivery

104(1) The seller may stop delivery of goods in the possession of a carrier or other bailee

(a) if he discovers the buyer to be insolvent,

(b) if the buyer repudiates,

(c) if the buyer fails to make a payment due before delivery,

or

(d) if, for any other reason, the seller has a right to withhold or reclaim the goods.

When right ceases

(2) The seller may stop delivery as provided in subsection (1) until

(a) the buyer receives the goods

(b) any bailee of the goods, except a carrier, acknowledges to the buyer that he holds the goods for the buyer,

(c) the course of transit of goods in the possession of a carrier has ended, or

(d) a negotiable document of title relating to the goods has been negotiated to the buyer.

End of course of transit

(3) Where, after the arrival of the goods at the appointed destination, the carrier acknowledges to the buyer or his agent the he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

Effect of buyer's rejection

(4) Where the goods are rejected by the buyer and the carrier continues in possession of them, the transit is deemed not to be at an end even if the seller has refused to receive them back.

Carrier's refusal to deliver

(5) Where the carrier wrongfully refuses to deliver the goods to the buyer or his agent, the transit is deemed to be at an end.

Part delivery

(6) Where delivery of part of the goods has been made to the buyer or his agent, delivery of the remainder may be stopped unless delivery of the part has been made under circumstances that show an agreement to give up possession of the whole of the goods.

Notification to bailee

(7) To stop delivery, the seller shall notify the bailee in sufficient time to enable the bailee by reasonable diligence to prevent delivery of the goods.

Bailee's duty to hold the goods

(8) After receiving a notification pursuant to subsection (7), the bailee shall hold and deliver the goods according to the directions of the seller, but the seller is liable to the

bailee for any charges or damages resulting from compliance with the seller's directions.

Negotiable document of title

(9) Where a negotiable document of title has been issued for the goods, the bailee is not obliged to obey a notification to stop until surrender of the document.

Non-negotiable bill of lading

(10) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop delivery of the goods that is received from a person other than the consignor.

(Seller's right to resell) Seller's right to resell

105(1) Where the seller is entitled to cancel, he may resell the goods concerned or the undelivered balance of the goods and, if the resale is made in commercially reasonable time and manner, may recover the difference between the resale price and the contract price, less any expenses saved in consequence of the buyer's breach.

Method of resale

(2) The resale may be public or private sale and may include sale by way of one or more contracts to sell or by way of identification to an existing contract of the seller.

Sale must be commercially reasonable

(3) The resale may be as a unit or in parcels or at any time and place on any terms, but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable.

Identification of resale to contract

(4) The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

Purchaser in good faith

(5) A purchaser who buys in good faith at a resale take the goods free of any rights of the original buyer, even though the seller fails to comply with one or more of the requirements of this section.

Seller not reselling properly

(6) If the seller does not resell in a commercially reasonable manner, he may not sue for damages under this section.

Seller not accountable for profit

(7) The seller is not accountable to the buyer for any profit made on a resale.

(Seller's action for the price) Seller's action for the price

106(1) Where the buyer fails to pay the price as it becomes due, the seller may recover the price due

(a) of goods that he has delivered, unless the buyer has rightfully rejected the goods,

(b) of conforming goods lost or damaged while the risk of their loss is upon the buyer,

(c) of goods identified to the contract, if the seller, being entitled to do so, is unable after reasonable effort to resell them at a reasonable price or the circumstances indicate that he would be unable to resell them at a reasonable price.

Anticipatory repudiation

(2) Where the buyer repudiates the contract before the seller has made delivery, section 88 governs the seller's rights.

Seller's obligation to hold goods

(3) Where the seller sues for the price, he shall hold for the buyer any goods that have been identified to the contract and are in his control, except that if resale becomes possible he may resell them at any time prior to the collection of the judgment, in which case the net proceeds of any resale are to be credited to the buyer and payment of the judgment entitles the buyer to any goods not resold.

Meaning of delivery

(4) For the purposes of this section, delivery takes place

(a) where the contract requires or authorizes the seller to ship the goods by carrier unless it requires him to deliver at a particular destination, when the goods are delivered to the carrier, even though the shipment is under reservation,

(b) where the contract requires or authorizes the seller to ship the goods by carrier and requires him to deliver them at a particular destination, when the goods are tendered at the destination so as to enable the buyer to take delivery,

(c) if the seller is a merchant and the buyer is not a merchant and the contract requires or authorizes the seller to ship the goods by carrier, when the goods are tendered to the buyer at the destination,

(d) where the goods are held by a bailee other than the seller and are to be delivered without being moved

(i) on the buyer's receipt of a negotiable document of title covering the goods,

(ii) on acknowledgment by the bailee to the buyer of the buyer's right to possession of them, or

(iii) on the buyer's receipt of a non-negotiable document of title or other written direction to deliver as provided in section 68(5), or

(e) where clauses (a) to (d) do not apply, when the buyer receives the goods.

Buyer's remedies

107 Where the seller breaches the contract, the buyer may, as provided in this Act

(a) exercise this rights under section 81(1),

(b) maintain an action for damages,

(c) obtain specific performance,

(d) exercise his rights under section 111,

(e) cancel the contract,

(f) recover so much of the price as has been paid.

Buyer's right to cancel

108 The buyer may cancel the contract and recover any portion of the purchase price paid where

(a) he has a right to cancel under section 73(3) or 90(2),

(b) the seller repudiates the contract under section 88(1), or

(c) subject to section 73(2), the buyer has rejected a non-conforming tender or delivery.

Buyer's lien on rejected goods

109 On rightful rejection, the buyer has a lien on goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody, and may hold and resell them, and section 105 applies with all the necessary modifications.

Buyer's claim for return of price

110 Any claim by the buyer for the return of the purchase price is subject to any reduction because of any benefits derived by him from the use or possession of the goods that is just in the circumstances.

(Buyer's procurement of substitute goods) Buyer's procurement of substitute goods

111(1) Where the buyer is entitled to cancel the contract, he may cover by making in a commercially reasonably time and manner any purchase of, or contract to purchase, goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price, less expenses saved in consequence of the seller's breach. Buyer's damages

(3) Failure of the buyer to effect cover does not bar him from any other remedy. Failure to cover

112(1) Where there is a breach of contract by the seller and the buyer has accepted the goods, the buyer may (Buyer's damages for breach re accepted goods) Buyer's damages for breach re accepted goods

(a) set up against the seller the breach of contract in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for breach of contract.

(2) In the case of a breach of warranty, the buyer's loss is prima facie the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. Measure of damages

(3) The fact that the buyer has set up a breach of contract in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of contract if he has suffered further damage. Right to maintain action

113(1) Where the seller or buyer breaches the contract, the other party may maintain an action against him for damages. (Action for damages) Right to damages

(2) The measure of damages is the estimated loss that the party in breach should have foreseen at the time of the contract as not unlikely to result from this breach of contract. Computation of damages

(3) An aggrieved party shall take reasonable steps to mitigate his damages. Mitigation of damages

(4) Where at the agreed time for performance Measure of damages

(a) the buyer wrongfully fails to accept and pay for the goods;

(b) the seller wrongfully fails to deliver the goods or the goods are rightfully rejected; or

(c) the buyer wrongfully rejects the goods;

the measure of damages is prima facie the difference between the contract price and the price that could have been obtained by a commercially reasonable disposition or purchase of the goods within or at a reasonable time and place after the aggrieved party learned of the breach, less any expenses saved in consequence of the breach.

Other cases

(5) Subsection (4) does not apply where

(a) the measure of damages would be inadequate to put the seller in as good a position as performance by the buyer would have done;

(b) the seller has resold the goods as provided in section 105; or

(c) the buyer has bought substituted goods as provided in section 111.

Incidental and consequential damages

(6) A seller's or buyer's claim for damages may include a claim for incidental or consequential damages.

Injury to person or damage to property

(7) The law as to remoteness of damage in tort apply to consequential claims for injury to person or property.

(Discretionary awards in certain cases) Discretionary awards for some breaches of warranty and of contract

114(1) Where there is

(a) a breach of contract by a non-merchant seller and it would be inequitable to award damages under section 113, or

(b) a breach of warranty not constituting a term of the contract of sale, whether the warranty was given by the seller or by a person mentioned in section 42(6);

the court may in lieu of or in addition to any other remedy on any terms and conditions that it considers just

(c) grant rescission of the contract,

(d) order a reduction in or return of the price of the goods,

(e) award damages, including an amount to compensate for loss or liability incurred in reliance on the warranty or contractual undertaking, or

(f) make an order involving any combination of the remedies described in clauses (c) to (e).

(2) In the exercise of its powers under subsection (1), the court may take into consideration Factors court may consider

(a) the fact that both persons are merchants or that one or neither is a merchant;

(b) whether the person giving the warranty or contractual undertaking purported to have knowledge or expertise or, as the other party knew, was merely transmitting information derived from another source;

(c) whether the person giving the warranty or contractual undertaking was negligent; and

(d) any other relevant circumstance.

115(1) In any action for breach of contract of sale, the court may order that the contract be performed specifically and may, in connection with that direction, impose any terms and conditions as to damages, payment of the price and otherwise that seem just to the court. (Specific performance) Specific performance

(2) In determining whether to make an order under subsection (1) at the suit of the buyer, the court shall take into account whether the buyer has Relevant factors

(a) a special property in the goods under section 67, and

(b) paid the whole or a part of the purchase price.

116(1) Subject to subsection (2), the rights and remedies of an aggrieved party arising otherwise than in contract are not affected by the existence of a contract of sale unless the contract itself so provides. (Other right and remedies) Other causes of action

(2) Where an innocent but non-negligent misrepresentation is an express warranty, the aggrieved party is limited to the rights and remedies provided in this Act for breach of warranty. Innocent misrepresentation

(3) The remedies available for fraudulent misrepresentation inducing the formation of a contract include a right to recover damages as provided int this Act for breach of warranty and, without prejudice to the generality of the foregoing, the aggrieved party does not have to elect between rescission of the contract and damages for breach of warranty. Fraudulent misrepresentation

PART X

MISCELLANEOUS

Repeal

117 *The Sale of Goods Act* is repealed except with respect to contracts of sale entered into before the day on which this Act comes into force.

APPENDIX B

LIST OF AMENDMENTS TO THE UNIFORM SALE OF GOODS ACT
APPROVED BY THE MANITOBA LAW REFORM COMMISSION, AS ORIGINALLY RECOMMENDED BY
THE ALBERTA INSTITUTE OF LAW RESEARCH AND REFORM ("Institute"),
A SUBCOMMITTEE OF THE BUSINESS LAW SUBSECTION OF THE MANITOBA BRANCH
OF THE CANADIAN BAR ASSOCIATION ("Manitoba subcommittee") AND
BY THE MANITOBA LAW REFORM COMMISSION ("Commission")

1. That the definition of "goods" in clause 1(w) expressly exclude corporate securities. (Institute) Clause 1(w) should be amended as follows:

> "Goods" means tangible personal property and includes the unborn young of animals and anything attached to or forming part of real property as provided in section 9 or 10, but does not include the money in which the price is to be paid, a thing in action or a security as defined in The Corporations Act;

2. That instead of seeking to reproduce in section 10 the priority rules relating to transactions involving land, the Act should contain a simple provision designating "The Real Property Act" and "The Registry Act" to regulate questions of priority in respect of transactions falling within section 10. (Institute) This amendment may be accomplished by deleting subsections 10(2) and (3) and replacing them with the following new subsection (2):

> The provisions of this section are subject to any third party rights provided by The Real Property Act or The Registry Act, as the case may be.

3. That no provision be made in future sale of goods legislation in Manitoba for a general duty of good faith based on fair dealing in the performance of duties under a contract of sale. (Institute) This recommendation will require the following drafting amendments:

(1) The deletion of the phrase "good faith" in the first line of s. 13;

(ii) the deletion of s. 14;

(iii) the deletion of subsection 84(6) and the substitution therefor of the following subsection:

> Any action by the buyer in accordance with this section is deemed not to be acceptance or conversion of the goods or to give rise to a claim in damages.

(iv) the deletion of the phrase "taken in good faith" in the second line of subsection 85(2).

4. That subsection 20(4) be redrafted so as to show that, where an offeror objects to the additional or different terms in a purported acceptance and the offeree does not respond to this objection, there is a contract on the terms of the original offer. (Institute) This amendment may be achieved by the following drafting change:

The deletion of subsection 20(4) and the substitution therefor of the following:

> Subsection 3 does not apply if the offeror seasonably notifies the offeree of his objection to the additional or different terms, in which event there is a contract on the offeror's terms unless the offeree in turn seasonably indicates an intention not to be so bound.

5. That section 22 of the Act be amended so that the courts are empowered only to award damages computed on the basis of an offeree's reliance on an offer, or generally to the extent necessary to avoid injustice, in those cases where a merchant offeror revokes an offer that has been expressly left open for acceptance and where no consideration has been given by the offeree for the offer to be left open. (Institute) This recommendation may be achieved by the following drafting change:

The deletion of section 22 of the Uniform Act and the substitution therefor of the following subsections:

> (1) This section applies where a merchant's offer to buy or sell goods expressly provides that it will be held open, whether or not for a time stated, and the offeree furnishes no consideration for the promise to keep the offer open.
>
> (2) Where an offer referred to in subsection (1) is revoked during the time stated or, if no time is stated, for a period not exceeding three months, the court may grant compensation limited to the recovery of any losses incurred as a result of reliance on the offer or generally to the extent necessary to avoid injustice.
>
> (3) An assurance of irrevocability described in subsection (1) in a form supplied by the offeree is not binding unless the assurance is separately signed by the offeror.

6. That section 23 of the Act be amended so as to remove from the courts the power to award damages computed on the basis of a concluded contract in those cases where the offeree has substantially relied on an offer not expressly left open for acceptance and the offeror could reasonably have expected such reliance. (Institute and Manitoba subcommittee) This recommendation may be achieved by the following drafting change:

The deletion of clause 23(a) so that s. 23 would now be as follows:

> Where an offer to buy or sell goods that the offeror should reasonably expect to induce substantial action or forbearance by the offeree before acceptance induces such action or forbearance and is revoked, the offeror is bound to compensate the offeree, and in any such case, the court may grant compensation limited to the restoration of any benefit conferred upon the offeror, to the recovery of any losses incurred as a result of reliance on the offer or generally, to the extent necessary to avoid injustice.

7. That section 27 of the Act be amended so that in all cases an agreement, whether or not executed, varying or rescinding a contract of sale of goods need have no consideration to be binding. (Institute) This recommendation may be achieved by the following drafting change:

The deletion of section 27 and the substitution therefor of the following:

> An agreement, whether executed or not, varying or rescinding a contract of sale needs no consideration to be binding.

8. That a court exercising its powers to review transactions for unconscionability under section 31 of the Act not be permitted to raise the issue of unconscionability of its own motion. (Institute) This recommendation may be achieved by the deletion of subsection 31(3).

9. That subsection 32(1) of the Act be amended so as to provide that, where one of the parties to a contract of sale is to fix the price, the price chosen must be a reasonable one. (Institute) This recommendation may be achieved by the deletion of subsections 32(1) and (2) and the substitution therefor of the following subsection:

> An agreement may constitute a contract of sale even though the price is not settled and, in that case, the price is a reasonable price at the time of the delivery if
>
> (a) nothing is said as to price;
> (b) the price is to be fixed by one of the parties'
> (c) the price is left to be agreed by the parties or another person and they fail to agree or the other person fails to fix the price; or
> (d) the price is to be fixed in terms of some agreed market or other standard as set or recorded by another person or agency and it is not so said or recorded.

10. That the reference to a right of cancellation of the contract be deleted from subsection 32(3) of the Act. (Institute) This recommendation may be achieved by the deletion of the phrase "may treat the contract as cancelled or" in the third and fourth lines of subsection 32(3).

11. That the reference to good faith in section 33 of the Act be deleted. (Institute). This recommendation may be achieved by deleting the phrase "in good faith" from the fifth line of section 33.

12. That where reliance is a necessary part of a warranty claim, the Act be redrafted so as to show clearly that the claimant has the burden of proof of establishing reliance. (Institute) This recommendation may be achieved by the following drafting changes:

(1) the deletion of the phrase "except where the buyer did not rely, or it was unreasonable for him to rely, on the statement" in the definition of "express warranty" in s. 1(p)(ii) and the substitution therefor of the following phrase: "and which is relied on by the buyer, except where such reliance is unreasonable".

(2) the deletion of subsection 42(5) and the substitution therefor of the following:

> A statement relating to the subject matter of the contract and made by a buyer to a seller is an express warranty if the seller relies on the statement except where such reliance is unreasonable.

(3) the deletion of subsection 42(8) and the substitution therefor of the following:

> A statement relating to the subject matter of the contract and made to a buyer by a manufacturer, distributor or another person with a direct business interest in any sale of the goods is an express warranty if the buyer relies on the statement, except where such reliance is unreasonable.

12. That clause 44(1)(c) of the Act be amended to require sellers of new goods only to make reasonable efforts to ensure that spare parts and repair facilities will be available for a reasonable time, unless circumstances demand otherwise. (Manitoba subcommittee) This recommendation may be achieved by the deletion of clause 44(1)(c) and the substitution therefor of the following:

> In the case of new goods, unless the circumstances indicate otherwise, that sellers will make reasonable efforts to ensure that spare parts and repair facilities, if relevant, will be available for a reasonable period of time.

13. That clause 44(3)(a) of the Act be deleted and the following clause be substituted: (Commission)

> to defects known to the buyer before the contract was made;

14. That clause 48(4)(b)(ii) be amended by striking out the word "document" and substituting therefor the word "writing". (Commission) The reason for this change is that the word "writing" has a special meaning ascribed by s. 1(11) of the Act.

15. That subsection 114(1) of the Act be redrafted so that the court's power to review damage awards against non-merchant sellers be exercised where a full scale award is "unfair" rather than "inequitable". (Institute) This recommendation may be achieved by deleting the word "inequitable" in s. 114(1)(a) and replacing it with the word "unfair".

16. That the extended warranty rights conferred by section 50 of the Act on subsequent buyers be given also to donees. (Institute) This recommendation may be achieved by the deletion of clause 50(1)(e) and the substitution therefor of the following:

> "subsequent buyer" means a buyer who buys goods that have previously been sold by a prior seller to an immediate buyer or a party acquiring by gratuitous transfer the title to such goods in which case the disposition by which he acquires title shall be treated as a sale for the purpose of this section.

17. That subsection 88(1) of the Act be amended so as to make it clear that the provision applies only to unlawful repudiation of a contract. (Institute) This recommendation may be achieved by the deletion of the phrase "a repudiation of the contract, the other party may" in the second and third lines of s. 88(1) and the substitution therefor of the following: "an unlawful repudiation of the contract, the aggrieved party may".